No. (1)

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1995

ALLIGATOR FARMS, INC.,

Petitioner,

vs.

DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C.,

Respondents.

CONSOLIDATED WITH

RAYMOND JOHN O'BRIEN, III,

Petitioner,

vs.

DAVID W. GRONER,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal, Third Circuit, State of Louisiana

PETITION FOR WRIT OF CERTIORARI FOR ALLIGATOR FARMS, INC.

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Louisiana Statute of Limitations applicable to attorneys violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

2. Does the Louisiana Statute of Limitations applicable to attorneys violate the Due Process Clause of the United States Constitution?

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

1. James Buckner Doyle - Woodley, Williams, Fenet, Boudreau, Norman & Brown, Post Office Box 3731, 500 Kirby Street, Lake Charles, Louisiana 70602, (318) 433-6328, Attorneys for Paul Deballion, trustee in bankruptcy for Alligator Farms, Inc., Petitioner.

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3. William M. Bass - Voorhies & Labbe, Post Office Box 3527, 700 St. John Street, Lafayette, Louisiana 70502-3527, (318) 232-9700, Attorneys for David Groner and David Groner & Associates, a P.L.C., Respondent.

4. Leon J. Minvielle, III - Haik and Minvielle, Post Office Box 11040, 1101 East Admiral Doyle Drive, Suite 400, New Iberia, Louisiana 70562-1040, (318) 365-5486, Attorneys for Raymond John O'Brien, III, Petitioner.

Petitioner, Alligator Farms, Inc., has no parent company and has no non-wholly owned subsidiary companies.

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OPINIONS BELOW

Alligator Farms, Inc. and Raymond John O'Brien, III, filed a Petition for Damages against David Groner and David Groner & Associates, A P.L.C. on August 4, 1993. On December 8, 1993, David Groner and David Groner & Associates, A P.L.C. filed a Peremptory Exception of Prescription. The Exception came on for hearing on June 3, 1994, before Honorable Judge C. Thomas Bienvenu, Jr., Louisiana State Court Judge of the Sixteenth Judicial District Court, issued Written Reasons for Judgment on August 25, 1994, which maintained the exception of prescription filed by David Groner and David Groner & Associates, A P.L.C. Judgment was signed August 25, 1994. Raymond John O'Brien and Alligator Farms filed timely appeals.

The Louisiana Third Circuit Court of Appeal affirmed the decision of the trial court with written reasons on May 31, 1995. The Louisiana Supreme Court denied petitioner's Petition for Writ of Certiorari on October 27, 1995. The Louisiana Supreme Court further denied petitioner's Application for Reconsideration of Writ of Certiorari on November 27, 1995.

STATEMENT OF JURISDICTION

This petition seeks review of the Judgment of the Louisiana Third Circuit Court of Appeal entered on May 31, 1995. Under Louisiana procedure, that Judgment was not final until the Louisiana Supreme Court denied petitioner's Application for Writ of Certiorari or Review on October 27, 1995, and further denied the Application for Reconsideration of the Writ of Certiorari on November 27, 1995.

This petition is filed timely pursuant to 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a) in that the validity of a statute of the state of Louisiana is repugnant to the Constitution of the United States of America.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

La. Civ. Code Art. 6. Retroactivity of laws

> In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.

La. Civ. Code Art. 3458. Peremption; effect

> Peremption is a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the peremptive period.

La. Civ. Code Art. 3461. Renunciation, interruption, or suspension ineffective

> Peremption may not be renounced, interrupted, or suspended.

La. Civ. Code Art. 3492. Delictual actions

> Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage.

La. Civ. Code Art. 3499. Personal action.

> Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years.

La. Rev. Stat. 9:5605. Actions for legal malpractice

> A. No action for damages against any attorney at law duly admitted to practice in this state, any partnership of such attorneys at law, or any professional corporation, company, organization, association, enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, whether based upon tort, or breach of

contract, or otherwise, arising out of an engagement to provide legal services shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect is discovered or should have been discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.

B. The provisions of this Section are remedial and apply to all causes of action without regard to the date when the alleged act, omission, or neglect occurred. However, with respect to any alleged act, omission, or neglect occurring prior to September 7, 1990, actions must, in all events, be filed in a court of competent jurisdiction and proper venue on or before September 7, 1993, without regard to the date of discovery of the alleged act, omission, or neglect. The one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.

C. Notwithstanding any other law to the contrary, in all actions brought in this state against any attorney at law duly admitted to practice in this state, any partnership of such enterprise, or other commercial business or professional combination authorized by the

> laws of this state to engage in the practice of law, the prescriptive and peremptive period shall be governed exclusively by this Section.

STATEMENT OF THE CASE

Raymond John O'Brien formed Alligator Farms, Inc. in 1989 in New Iberia, Louisiana, before becoming associated with David Groner. During the planning stages for the Alligator Farms enterprise, David Groner came to represent Raymond John O'Brien and Alligator Farms. He assisted O'Brien in preparing a financial package, or pro forma, and a business proposal for potential investors and/or for lending institutions. (Tr. p. 85). David Groner also approached O'Brien and proposed that he be given a percentage of the Alligator Farms venture in lieu of payment of attorney fees which had accrued. O'Brien agreed to this proposal, and Groner became an officer and shareholder in Alligator Farms as well as an attorney continuing his duty of obtaining financing for the company. (Tr. pp. 79, 98 and 107). Additionally, Groner, as attorney, prepared and filed various corporate documents and was listed as the company's agent for service of process. (Tr. pp. 106 and 107).

One of the documents that David Groner drafted himself was an "Incorporators and Shareholders Agreement of Alligator Farms, Inc.", which he and John O'Brien signed on November 11, 1990, whereby Groner took upon himself the following obligations:

> FOR AND IN CONSIDERATION of providing or securing adequate financing outlined as follows, DAVID W. GRONER shall be issued five hundred (500) shares of corporation stock:

> a. Payment due upon signing of the agreement: $15,000.
>
> b. Responsibility for obtaining all capital necessary to finance the operations of Alligator Farms, Inc., including meeting all operating expenses, and financing for capital improvements necessary to fully develop the operations of Alligator Farms, Inc. which are outlined in Exhibit "1", however reasonable time is allowed for the finances to be obtained.

Exhibit D-1; (Tr. pp. 53 and 54). Clearly, David Groner contractually obligated himself to "secure adequate financing" for the Alligator Farms venture, and clearly he failed in this *contractual* obligation.

In the course of time, First Production Credit Corporation agreed to loan Alligator Farms the amount of $1,500,000 which was necessary to fully fund the venture and fulfill the original business plans for the venture. (Tr. pp. 105, 106 and 125). Before the closing of the loan with First Production Credit, however, David Groner, claiming he was looking for more favorable terms upon which Alligator Farms could borrow money than those imposed by First Production Credit, contacted friends who put him in touch with representatives of Hibernia Bank in Lafayette, Louisiana. (Tr. pp. 86, 127 and 130). At a meeting between representatives of Hibernia, O'Brien and Groner, Hibernia purportedly agreed that they would fund the full $1,500,000 with terms and conditions more favorable than those offered by First Production Credit. (Tr. p. 109). Hibernia also informed Groner and O'Brien that Hibernia could commence funding in as few as

ten days. (Tr. p. 121). Hibernia had experience in the oil and gas fields in which Raymond John O'Brien owned substantial production, and their primary interest in the transaction was not the new alligator farm venture but O'Brien's substantial oil and gas holdings. (Tr. p. 130).

Defendant entered into evidence a letter dated February 4, 1991, Exhibit D-2, p. 56, from First Production Credit stating that Alligator Farm's loan application had been denied. (Tr. p. 85). However, negotiations continued after that date, as petitioners had submitted a revised loan application. (Tr. pp. 104, 105 and 125). Alligator Farms and O'Brien's negotiations with Hibernia began some time after February 1991, and after both O'Brien and David Groner believed they had a verbal commitment from First Production for a $1,000,000 loan. (Tr. pp. 105 and 125).

At this point, while Groner may have provided Alligator Farms with more favorable funding, he placed his clients in substantial jeopardy by seeking financing from Hibernia in the event Alligator Farms could not perform on its obligations. At any rate, Hibernia advanced $100,000 very soon after the initial meeting with Hibernia representatives, and while Hibernia was still investigating O'Brien's collateral (Tr. p. 108), O'Brien signed a collateral mortgage of $1,500,000 on the strength of his belief in a valid commitment, an action he would not have taken without that belief. (Tr. pp. 102, 112 and 113); Exhibits P-1 and P-2. He also would not have signed a collateral mortgage of $1,500,000 for a loan of $400,000.

Immediately after the original funding, Groner and O'Brien began to contract with vendors and suppliers overseas, and in the interim Hibernia advanced another $250,000 to the venture. (Tr. p. 107). At the time of this second advance Hibernia still had not completed the in-house evaluation of O'Brien's properties, nor had a title opinion been completed. (Tr. p. 108). Shortly

thereafter, however, Hibernia informed Groner and O'Brien that they no longer performed in-house oil and gas evaluations on properties and that funding would be suspended until the bank could obtain an independent evaluation of O'Brien's oil and gas properties. (Tr.pp. 102 and 119); Exhibit D-3, pp. 57, 58. In response to this development, John Madison, one of O'Brien's oil and gas business attorneys, at O'Brien's request, sent a letter to the bank requesting that Hibernia continue funding the alligator project; Exhibit D-3, pp. 57, 58. Harold Turner of Hibernia responded by saying they had no written or verbal agreement to loan $1,500,000, and also stated: "As long as there is a misunderstanding concerning this commitment issue, *I will not be able to continue working with your clients.*" (Emphasis added) (Exhibit D-4, p. 60). However, after the date this letter was sent, Hibernia advanced a further $50,000. (Tr. p. 108). In all, Hibernia advanced $400,000 to Alligator Farms and John O'Brien before his oil and gas interests had been evaluated and a title opinion had been completed. (Tr. p. 108).

Then, sometime thereafter, Hibernia became reluctant to advance more funds. (Tr. p. 108). Efforts to negotiate further funding stalled. Alligator Farms was unable to meet the enormous obligations it had incurred based on the promise of $1,500,000 to be forthcoming from Hibernia. Unable to meet their obligations, O'Brien filed a Chapter 11 bankruptcy, and Alligator Farms filed a Chapter 7. (Tr. p. 109). Meanwhile, David Groner was still representing to Alligator Farms and O'Brien that there was a written loan commitment from Hibernia and/or documentation of the commitment, and that the bank would have to loan the remainder of the $1,500,000. As a result, Alligator Farms and O'Brien listed a potential cause of action against Hibernia for failure to perform as an asset in their bankruptcies. (Tr. p. 109).

On the strength of David Groner's representations, and

relying on his expertise as an attorney for Alligator Farms and John O'Brien, O'Brien argued in the bankruptcy court that he should be discharged as surety on the debt of Alligator Farms to Hibernia because Hibernia had breached an agreement to lend Alligator Farms $1,500,000. (Tr. p. 109). Additionally, the parties engaged in negotiations with Hibernia which addressed the commitment. (Tr. p. 109). This argument was ultimately unsuccessful, however, since no *written agreement* or documentation of the commitment between Alligator Farms and O'Brien and Hibernia was found, as required by LSA-R.S. 6:1121 *et seq.*

During the course of O'Brien's bankruptcy action involving Hibernia, in the latter part of August 1992, discovery revealed that there was indeed no written commitment from Hibernia to make the loan for $1,500,000 nor any document which could arguably be considered such a commitment. (Tr. pp. 110 and 114). David Groner had, however, at all times represented to the petitioners that such a written loan commitment did exist, and that this commitment did obligate Hibernia to lend the entire amount requested by the petitioners. It was not until November of 1992 that O'Brien and Alligator Farms learned that there was no basis in law for a cause of action against Hibernia Bank, pursuant to a court ruling. (Tr. pp. 111 and 112).

In the latter part of August of 1992, O'Brien and Alligator Farms saw for the first time documents produced by Hibernia concerning the loan. (Tr. pp. 114 and 115). There was no commitment letter in those documents. In November of 1992, Alligator Farms and O'Brien appeared before the bankruptcy court on the matter of the Hibernia Bank obligation. When they could not produce a written commitment from the bank pursuant to La. Rev. Stat. 6:1121 *et seq.*, the Bankruptcy Judge refused to consider any other evidence in the matter. (Tr. pp. 111, 112 and 115). In February 1993, O'Brien suffered the consequences of

Groner's failure to obtain the written commitment by repaying the $400,000 plus interest to Hibernia. (Tr. p. 112).

Therefore, the suit filed by petitioners against respondents on August 3, 1993, was timely as filed within one year of the discovery that a cause of action existed against David Groner and David Groner & Associates, A P.L.C. and that petitioners actually sustained damages.

The allegation that Louisiana's statute concerning a prescriptive and peremptive period for legal malpractice was unconstitutional was first raised during the Application for Writ of Certiorari to the Louisiana Supreme Court filed on behalf of Alligator Farms, Inc., to review the ruling of the Louisiana Court of Appeal, Third Circuit, said writ being filed on July 3, 1995. The constitutionality of this particular provision was raised in Assignment of Error Number 2 and was discussed at length in the body of the applicant's writ application. (*See* Appendix , 23a-27a). The Louisiana Supreme Court denied the writ application filed by Alligator Farms, Inc., on October 27, 1995.

REASONS FOR GRANTING THE WRIT

I.

THE RULING OF THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL IS UNCONSTITUTIONAL AS APPLIED BECAUSE IT CREATES ARBITRARY CLASSIFICATIONS AND DISCRIMINATES AGAINST VICTIMS OF LEGAL MALPRACTICE AND BECAUSE IT DIVESTS THE PETITIONERS OF VESTED RIGHTS.

The Louisiana Legislature has created an unconstitutional situation within the state of Louisiana which creates separate

classes of tort feasors and unlawfully discriminates between the victims of tort feasor activity. The Legislature has seen fit to grant a much greater degree of protection and immunity to an insular minority of attorney tort feasors and has created an unduly harsh burden upon the victims of their malpractice, all of which is repugnant to the Constitution of this United States.

Amendment XIV, Section 1 of the United States Constitution provides as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is the argument of the applicants herein that the statute created by the Louisiana Legislature has created classifications within its jurisdiction which violate both the Equal Protection and Due Process Clause sof this Amendment.

Applicants assert that respondent, David Groner, breached his fiduciary duty (committed legal malpractice) in the following instances:

A. Failure to get a written loan commitment from Hibernia Bank for the $1,500,000 needed; and

B. Placing his clients' assets in jeopardy with Hibernia

when another company, First Production Credit Corporation, was ready to loan all $1,500,000 with less security than Hibernia wanted.

Petitioners also assert that their claims against respondents have not prescribed, as ruled by the Louisiana Third Circuit Court of Appeal. This is not simply an issue of when petitioners discovered the malpractice, but is also one of when petitioners sustained damages. It is further an example of how the Louisiana Legislature has treated lawyer tort feasors much more favorably than layman tort feasors, all in violation of the United States Constitution.

The class distinctions are drawn and created by La. R.S. 9:5605 and La. Civ. Code Art. 3492. La. R.S. 9:5605 provides as follows:

> A. No action for damages against any attorney at law . . . shall be brought . . . unless filed . . . within one year from the date that the alleged act, omission, or neglect was discovered; however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission or neglect.
>
> B. The provisions of this Section are remedial and apply to all causes of action without regard to the date when the alleged act, omission, or neglect occurred. However, with respect to any alleged act, omission, or neglect occurring prior to September 7, 1990, actions must, in all events, be filed in a court of competent jurisdiction and proper venue

> on or before September 7, 1993, without regard to the date of discovery of the alleged act, omission, or neglect. The one-year and three-year periods of limitation provided in Subsection A of this Section are peremptive periods within the meaning of Civil Code Article 3458 and, in accordance with Civil Code Article 3461, may not be renounced, interrupted, or suspended.
>
> C. Notwithstanding any other law to the contrary, in all actions brought in this state against any attorney at law duly admitted to practice in this state, any partnership of such enterprise, or other commercial business or professional combination authorized by the laws of this state to engage in the practice of law, the prescriptive and peremptive period shall be governed exclusively by this Section.

In contrast, La. Civ. Code Art. 3492 creates a separate prescriptive period for layman tort feasors as follows:

> Delictual actions are subject to liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained. It does not run against minors or interdicts in actions involving permanent disability and brought pursuant to the Louisiana Products Liability Act or state law governing product liability actions in effect at the time of the injury or damage.

As can be seen, an action against a layman tort feasor lies only after injury or damage has been sustained, and not necessarily the date of the act or omission.

The statute at issue here, La. R.S. 9:5605, was created by the Louisiana Legislature and was adopted by a discreet and insular minority of the population, *i.e.*, attorneys, who make up the vast majority of the legislature. The political impotence of the vast population of the state of Louisiana coupled with the beneficial nature of the statute to the Legislators themselves, created a "we-they" generalization which can only be likened to racial classifications. In the typical racial classifications that disadvantage minorities, Legislatures have traditionally not only not been black; they have been white. A decision to distinguish blacks from whites therefore has its roots in a comparison between a "we" stereotype and a "they" stereotype. Eli, *Democracy and Distrust,* 145-57 (1980). Likewise, the Louisiana legislation giving preferential treatment to attorney tort feasors and not to other general tort feasors, creates a "we-they" stereotype which must be reviewed with the strictest scrutiny and one which cannot be sustained in this matter.

As set forth in paragraph 26 of the petition for damages filed herein, O'Brien and Alligator Farms alleged that they discovered the act, omission or neglect — namely, Groner's malpractice — at the earliest in August of 1992 and actually sustained damages because of this malpractice thereafter. Within *one year* afterward, namely August 3, 1993, Alligator Farms filed its Petition for Damages. Regarding the peremption issue, the petition alleges that Groner's actions occurred in 1991 and 1992, but were not discovered until at least August, 1992. The suit was filed in August, 1993, well within the *three-year* peremption provision of R.S. 9:5605.

Furthermore, the doctrine of *contra non valentem non currit praescriptio* means that prescription does not run against a person who could not bring his suit, and is a judicial exception to prescription. The Louisiana Supreme Court in *Lima v. Schmidt*, 595 So. 2d 624 (La. 1992) stated:

> Prescriptive statutes are strictly construed against prescription and in favor of the obligation sought to be extinguished; thus, of two possible constructions, that which favors maintaining, as opposed to barring, an action should be adopted. . . . To soften the occasional harshness of prescriptive statutes, our courts have recognized a jurisprudential exception to prescription: *contra non valentem non currit praescriptio* which means that prescription does not run against a person who could not bring his suit.

Id. at 629. Citations omitted.

Up until August, 1992, when the petitioners learned with certainty that there was no written loan commitment by Hibernia, David Groner had assured petitioners that there was a written loan commitment or a similar document. The letter of July 11, 1991, Trial Exhibit D-4, from Hibernia stated the bank had no written commitment to loan the money. The bank nevertheless did advance more cash following this letter, which also stated that they would *not* be doing any more business with Alligator Farms until the matter of there being no commitment was cleared up. There is nothing in the hearing testimony or documentary evidence entered to show that petitioners ever acknowledged the bank's letter or expressed an understanding of its contents, as Hibernia had demanded.

In other words, the July 11, 1991, letter did not end the negotiations between the bank and the petitioners. Hibernia continued to investigate O'Brien's oil and gas holdings, and more money was advanced, as well as there being further discussions regarding the loan. This was the error the Trial Judge made. He thought the July 11, 1991, letter made the bank's

position perfectly clear once and for all, and that the petitioners willfully ignored the finality of the bank's position.

This is simply not the case. After the exchange of letters, O'Brien and Alligator Farms relied upon their attorney's continuing representations that the company did have a valid commitment from Hibernia, and they trusted their attorney to protect their interests in that matter. Their trust was well founded as Hibernia continued to provide funding *after* the correspondence referenced above. Alligator Farms correctly relied upon its attorney's representations that the bank was performing pursuant to its commitment.

This trust was obviously misplaced, however, since there is no evidence in the record that David Groner responded to this letter, as he should have, by seeking to obtain a written commitment from the bank. At that time, the relationship between Groner and Alligator Farms was ongoing as attorney and client, and Groner was still an officer and shareholder in the corporation.

In the case of *Braud v. New England Ins. Co.*, 576 So. 2d 466 (La. 1991), the Louisiana Supreme Court recognized that prescription would be suspended "during the attorney's continuous representation of the client regarding the specific subject matter in which the alleged wrongful act or omission occurred".

The *Lima v. Schmidt* case, *supra*, quoted jurisprudence from other states to describe the suspension of prescription for the so-called continuous representation rule:

> The continuous representation rule appropriately protects the integrity of the attorney-client relationship and affords the

> attorney an opportunity to remedy his error (or to establish that there has been no error), while simultaneously preventing the attorney from defeating the client's cause of action through delay. *Wall v. Louis*, 393 N.W.2d 758, 763 (N.D. 1986). The rationale behind this rule is that '"[a] plaintiff cannot justly be held to be 'sleeping on his rights' when he is relying upon a honored fiduciary relationship (sic)."

Id. at 630.

In order for the continuous representation rule to apply, the attorney must have an ongoing relationship with the client after the alleged malpractice for the performance of the same or related services, and the relationship is not merely a continuity of a general professional relationship. *See Lima*, *supra*, at 630. *Lima* also stated that "termination is not synonymous with the change of counsel. . . ."

In the case at bar, David Groner continued to represent petitioners well after the July 11, 1991, letter from Hibernia expressing the fact that they had made no written commitment to loan the $1,500,000. He also continuously warranted to petitioners that Hibernia would be forced to lend the entire amount or to pay damages because it had a written loan commitment.

In the past, an action for legal malpractice was delictual and governed by the one-year prescription of Louisiana Civil Code Article 3492. *See Lima v. Schmidt*, *supra*, at 628, and the cases cited therein. The rule is subject to two exceptions: (1) when the attorney expressly warrants a specific result and fails to obtain that result, and (2) when the attorney agrees to perform certain

work and does nothing whatsoever. "In these two contexts, the action is in contract and subject to the ten-year prescriptive period provided by LSA-C.C. art. 3499." *Lima, supra*, 628, at note.

Even if this Court finds that petitioners' claims against Groner have prescribed under the provisions of La. R.S. 9:5605, it is clear that these claims have not prescribed under La. Civ. Code art. 3499.

Petitioners obviously did not sustain damages at the time of the July 11, 1991, letter from Hibernia Bank. At that time, David Groner could still have negotiated a loan such as Alligator Farms needed and could have obtained a valid, written commitment from the bank by whatever means would have been required. He did not do so then or later, and eventually he abandoned the venture altogether. Apparently, at that point, Groner thought he was done with his obligations to the corporation, but he had overlooked the matter of the "Incorporators and Stockholders Agreement of Alligator Farms, Inc." — which he had drafted — which obligated him to secure financing for Alligator Farms. Since the prescription period for breach of a contract is a personal action with a prescriptive period of ten years, this provides a further reason in law why this action has not prescribed.

On the basis of their belief that Hibernia was committed to loaning the venture more money up to the amount of $1,500,000, petitioners brought Hibernia into the bankruptcy action, a cause of action against Hibernia was listed as an asset in the bankruptcy proceedings, and the suit progressed to the discovery stage. *At the same time*, though, negotiations for the loan with Hibernia were ongoing. Learning through discovery that Hibernia had made no written commitment, petitioners could not maintain a statutory action to force Hibernia to honor its commitment to loan them

$1,500,000. It was at that time that Alligator Farms sustained damages.

In *Simpkins v. Means*, 612 So. 2d 160 (La. App. 1st Cir. 1992), the plaintiff invoked the jurisprudential doctrine of *contra non valentem* and contended that prescription was suspended because he was unaware that he had a cause of action against his union, and, therefore, he was also unaware of a potential malpractice claim against the defendants until he was so advised by his present counsel in October, 1987. *Contra non valentem*, the court said, would only aid Simpkins if his ignorance of the cause of action was excusable, since the doctrine applies only where the cause of action is not known or reasonably knowable by the plaintiff. The trial court found that Simpkins knew the facts necessary to state a cause of action because he was well-versed, from past experience in several other lawsuits, in the availability of legal redress for wrongful actions and had a working knowledge of Louisiana prescription periods. In the case at bar, Mr. O'Brien did not have extensive litigation experience and relied upon the legal advice of David Groner concerning the loan commitment from Hibernia Bank.

By the same token, petitioners could not sue David Groner until they knew they had a cause of action against him, *after* finding no written loan commitment did exist; the rest of the $1,500,000 would not be forthcoming; and they could not compel Hibernia to honor their commitment. This was proof of Groner's failure to protect his client's interests and secure a viable commitment.

As explained in the case of *Rayne State Bank & Trust v. National Union Fire Ins.*, 483 So. 2d 987 (La. 1986):

> In Louisiana, prescription does not begin to run until damage is sustained. The tort prescription provisions in former C.C. 3537

> were reenacted without substantive change in 1984 as C.C. 3492. C.C. 3537 provided that the one-year prescriptive period for delictual actions runs "from [the day] on which the injurious words, disturbance, or damage were sustained." Mere notice of a wrongful act will not suffice to commence the running of the prescriptive period. The reason is clear. In order for the prescriptive period to commence, the plaintiff must be able to state a cause of action — both a wrongful act and resultant damages. Because the damage must necessarily occur after the wrongful act, prescription runs from that point and not from the date of the wrongful act. . . . Thus, until damage was '"sustained" by the bank, it had no cause of action, and prescription did not commence to run on the date the bank received notice of possibly fatal defects in the mortgages (995).

The decision in *Rayne State Bank* is generally relevant here. The bank filed a legal malpractice suit against attorneys and their law firms and the legal malpractice insurer for both firms, alleging it was damaged as a result of two allegedly fatally defective mortgages. One attorney had drafted the mortgages while the other reviewed them. Neither found the fatal defect. The mortgages were drawn to secure loans to corporate clients of the attorney who drafted the mortgages. After the corporations began to default on their loans, and having been informed that the corporations would possibly end up in bankruptcy, the bank consulted an attorney who specialized in advising banks in the event of borrower bankruptcies. The second attorney was hired strictly to render an opinion on the documents, which he did in a meeting with a bank representative. The attorney later stated that

he had explained the defects contained in the mortgages, while the bank representative stated that only some minor defects were pointed out.

The mortgages had been prepared in January of 1979. The bank representative and the attorney who reviewed the mortgages met in March of 1980. In November of 1980, the corporation representatives contacted the bank to say the mortgages were defective, and they threatened to file for bankruptcy and to seek invalidation of the mortgages in bankruptcy court unless the bank loaned them an additional $150,000, which the bank refused to do. The bank initiated foreclosure proceedings on the mortgages in January of 1981. The corporations filed for bankruptcy on January 20, 1981, and they filed adversary proceedings against the bank on January 27, 1981, to invalidate the mortgages insofar as they related to movable property. The bank filed third party complaints in bankruptcy court on April 28, 1981.

After settlement negotiations, during which the defendant law firms urged the bank to accept the debtor's offer of settlement, the matter was settled in October of 1981. The corporate debtors stipulated to the validity of the mortgages, and the stipulation was incorporated into the judgment of the bankruptcy court. Thus, a determination on the merits was precluded, and it was not decided one way or another whether the mortgages were invalid because of the defects. The bank filed suit in bankruptcy court against the law firms and their insurer, and that suit was pending when a subsequent civil suit was filed on March 24, 1982.

The Supreme Court, in deciding *Rayne State Bank*, stated that the bank had not sustained damages by virtue of the mere existence of defects in the mortgages. The possibility of damage from the existence of the defects was merely speculative and

uncertain and contingent on the possibility of an attack on the validity of the mortgages by a third party. There was also the possibility the debtors would declare bankruptcy. Had neither of these contingencies occurred, the bank would not have sustained any harm.

Following the decision in *Rayne State Bank*, the Louisiana Third Circuit in *Malone v. Wright*, 525 So. 2d 13 (La. App. 3 Cir. 1988), explained:

> The [Supreme] Court reasoned that regardless of the actual validity or invalidity of the mortgage, damage was sustained *because* the bank was forced to defend the attack. In other words, damage occurred when the rights of the bank were attacked in the adversary proceedings.

Id. at 15. Emphasis in text.

In the instant matter, if David Groner had fulfilled his fiduciary and contractual duties, especially after the July, 1991, letters, petitioners would not have sustained damages.

The Louisiana Court of Appeal has ruled that prescription begins to run on a legal malpractice claim from the date that a client receives the slightest notice that the attorney may have erred. The court has specifically ruled that even if no injury has been sustained, prescription begins to run nonetheless. The effect of this ruling is that while a plaintiff may not have a cause of action (as a cause of action is defined as a wrongful act and resulting injury), they would nonetheless be required to file a lawsuit to prevent the running of the statute of limitations. Clearly, the suit would be dismissed for lack of a valid cause of action and unless an injury would occur within a year, a client

would lose any and all rights to compensation by virtue of the application of the Third Circuit's interpretation of the prescriptive statute. This court in addressing similar arguments, has held them to be "intolerable." *See Taylor v. Giddens*, 618 So.2d 834 (La. 1993).

Previous rulings of the Louisiana Supreme Court made it very clear, even under the new attorney malpractice prescriptive statute, that an injury was required to commence the running of the applicable prescriptive period. The Louisiana Legislature, in response to these interpretations, amended the statute to declare it remedial in an attempt to retroactively apply a new interpretation of the statute to pending cases. This court has specifically stated that in certain cases, despite the Legislature's intent to retroactively apply a statute or amendment, it may not do so if it divests a plaintiff of a vested right or causes a constitutional violation. The effect of depriving a plaintiff of a vested right, as did the Louisiana Third Circuit, is unconstitutional.

The ruling of the trial court, as affirmed by the Louisiana Court of Appeal, would require any client to file suit against his attorney at the first hint of any problems in litigation. This ruling is contrary to well established principles of notice and discovery.

"As a general proposition, [it] is undeniably true [that] it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification." But "it must appear" that a classification is "based upon some reasonable ground — some difference which bears a just and proper relation to the attempted classification — and is not a mere arbitrary selection." *Gulf, C. & S. F. Ry. v. Ellis*, 165 U.S. 150 (1897). The classification created by the Louisiana Legislature, *i.e.*, attorney tort feasors versus layman tort feasors, has no reasonable basis in law. The legislation sets out to insulate attorneys from wrong doing and

unfairly discriminates against those clients who have placed their trust in the hands of an attorney, which trust is subsequently violated. The legislation encourages attorneys to cover up any wrong doings for a mere three year period whereafter they cannot be held liable for their actions under any scenario. A layman tort feasor who covers up his actions for a period of three years will still be subject to a tort lawsuit upon discovery by the victim of the wrong doing. Such base classifications are a violation per se of the Equal Protection Clause of the United States Constitution.

The "traditional approach" standard of judicial review grants a state "the broad discretion and classification in the exercise of its power of regulation" and interpose the "constitutional guarantee of equal protection" only "against discriminations that are entirely arbitrary." *Smith v. Cahoon*, 283 U.S. 553 (1931). In *Royster Guano Company v. Virginia*, 253 U.S. 412 (1920), the Court suggests a more active judicial role: "The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." The object of the Louisiana Legislature in creating these classifications is to treat their own, *i.e.*, attorneys, separately from normal, layman tort feasors. There is no compelling or justifiable reason to give an attorney greater protection from the laws than the average citizen enjoys. Such a classification smacks of croonyism and can not be tolerated in our federal government.

In its decision, the Third Circuit stated that under La. R.S. 9:5605, prescription runs from the date of the act or omission, not from the time of the injury, and cited *Succession of Hellmers*, 637 So. 2d 1302 (La. App. 4th Cir. 1994). In *Hellmers*, the court stated that Section 5605 was "amended to make clear that prescription runs from the *act or omission*, not from the injuries'." 637 So. 2d at 1306 (emphasis in original).

It makes little sense that prescription on a cause of action can begin to run before the potential plaintiff has even sustained any damages. However, assuming the Louisiana Third and Fourth Circuits' interpretation of the 1992 amendments is correct, and the addition of paragraph (b) to Section 5605 eliminated the requirement that the legal malpractice plaintiff have sustained damages before a cause of action accrues, that interpretation is unconstitutional and unduly harsh as it applies to Alligator Farms. The result of this interpretation and application of Section 5605 is that the 1992 amendments eliminated Alligator Farms' cause of action against Groner before that cause of action accrued.

The Louisiana Third Circuit, in this case, the Louisiana First Circuit in *Vaughn v. Slaughter*, 553 So. 2d 36 (La. App. 1st Cir. 1995), and the Louisiana Fourth Circuit in *Succession of Hellmers*, 637 So. 2d 1302 (La. App. 4th Cir. 1994), have all held that the purpose of the 1992 amendments to Section 5605 was to eliminate the requirement that a malpractice plaintiff sustain damage before a cause of action accrues for legal malpractice. If this interpretation is correct, the 1992 amendments simultaneously created a vested right in Alligator Farms and eliminated that right through the operation of the one-year prescriptive period. However, as interpreted and applied herein, the 1992 amendments to La. R.S. 9:5605 is unconstitutional as it violates the Federal Due Process clause and constitutes a taking of personal property without due process of law.

The Louisiana Supreme Court has on numerous occasions observed that the principal contained in La. Civ. Code art. 6 regarding interpretation of the retroactivity of legislative enactments, has constitutional implications under the due process and contract clauses of both the United States and Louisiana Constitutions. *Segura v. Frank*, 630 So. 2d 714, 721 (La. 1994); *Cole v. Celotex Corp.*, 599 So. 2d 1058, 1063 (La.

1992); *St. Paul Fire and Marine Ins. Co. v. Smith*, 609 So. 2d 809, 816 n. 11 (La. 1992); *Board of Commissioners v. Department of Natural Resources*, 496 So. 2d 281, 291 (La. 1986); *Conn v. Conn*, 468 So. 2d 1176, 1181 (La. 1985); *See also*, citations in *Segura*, 630 So. 2d at 721. Thus, even where the Legislature has expressed its intent to give a substantive law retroactive effect, the law may not be applied retroactively if it would impair a contractual obligation or disturb vested rights.

As the Louisiana Supreme Court stated in *Cole*, 599 So. 2d at 1064-64:

> [S]tatutes enacted after the acquisition of such a vested property right cannot be retroactively applied so as to divest a plaintiff of his vested right in his cause of action because such a retroactive application would contravene the due process guarantees.

599 So. 2d at 1063-64, citing *Faucheux v. Alton Oschner Medical Foundation Hospital and Clinic*, 470 So. 2d 878, 879 (La. 1985).

Accepting the Louisiana Third Circuit's interpretation of the relevant statute as correct, then the effect of the amendment would have been to create a new right in Alligator Farms, that being the right to sue prior to sustaining any injuries. Simultaneously, this statute would have deprived Alligator Farms of that very right by virtue of the application of the prescriptive statute.

The Louisiana Supreme Court reviewed an analogous situation in *Taylor v. Giddens*, 618 So. 2d 834 (La. 1993). In *Taylor*, the argument advanced by the defense would have resulted in wrongful death claimants losing their cause of action before it accrued. In responding to that argument, The court stated that:

> Their [victim's] remedy to address their civil wrong would have been eliminated prior to the accrual of their cause of action. Such a result is intolerable as it discriminates among wrongful death tort claimants.

Likewise, the result of this case is intolerable as it discriminates among legal malpractice tort claimants. "The requirement that laws be equal rests upon a theory of legislation quite distinct from that of pressure groups — a theory which puts forward some conception of a 'general good' as the 'legitimate public purpose' at which legislation must aim, and according to which the triumph of private or group pressure marks the corruption of a legislative process." Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 350 (1949). As this quote from the California Law Review points out, there must be a legitimate public purpose for the classification at issue. The legislation must be exempt from an appearance of impropriety imposed by a pressure group which would indicate the corruption of the legislative process. In this instance, we have the Louisiana Legislature made up mainly of attorneys, creating a classification which directly benefits them, to the detriment of the general good. The only persons benefiting from such a law are the Legislators themselves, and the select, hand picked professions to which they belong.

"[A] vast part of the output of the governmental process would be seen to consist of discrimination in the sense of an effort to redistribute wealth (in one form or another) from one group in the community to another, founded on the superior ability of one group to manipulate the political process rather than on any principal of justice or efficiency." Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 S. Ct. Rev. 1, 27. The Louisiana Legislature is a prime example of a single groups' ability to manipulate the

political process for their own benefit and the benefit of their colleagues as opposed to basing legislation on any principal of justice or efficiency. There is no rational basis for the creation of a completely separate classification to protect attorneys, especially when the legislation condones the attorney's concealment of any wrong doing for a three year period of time. La. R.S. 9:5605 must be stricken as repulsive to the constitutional guarantee of equal protection of the laws and the guarantee of due process as given by the United States Constitution.

CONCLUSION

In the instant litigation, petitioners sustained a great deal of damage, which, they discovered, had been the result of attorney malpractice. Petitioners relied on their attorney to do all that was necessary to secure a bank loan. Their attorney actively concealed the fact that he did not, and could not, obtain such a loan.

Petitioners filed their action against respondents herein within one year of learning their attorney had breached his fiduciary duty, this action was timely and should not have been dismissed.

To the extent that the courts below retroactively applied their interpretation of the statute to divest the petitioners of a vested right or to treat them differently from victims of other tort feasors, their decision violates the Due Process Clause of the United Constitution.

If La. R.S. 9:5605 was interpreted correctly by the courts below and the effect of the statute is to deprive a victim of recovery for a wrong committed upon them by another, the statute violates both the Louisiana and United States Constitutions.

The Louisiana Legislature has seen fit to attempt to insulate themselves from liability by placing a peremptive period on any action which can be brought against an attorney. This peremptive period has absolutely no basis in the law and creates insular classifications which deserve the strictest scrutiny from this Honorable Court. Furthermore, statutes such as the one at issue here, which treat attorney tort feasors much more favorably than layman tort feasors, do absolutely nothing to further the image of attorneys nor do they promote public confidence in the legislative process. Rather, the exact opposite effect occurs.

After review, petitioners herein respectfully request this Honorable Court to strike down the attorney malpractice prescriptive period and return all tort feasors to a status quo, that being that a tort victim has one year from the date injury or damage is sustained, with no peremptive period.

Respectfully submitted,

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APPENDIX A — DENIAL OF RECONSIDERATION OF WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT DATED NOVEMBER 27, 1995

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 95-C-1670

RAYMOND JOHN O'BRIEN, III

VERSUS

DAVID W. GRONER

C/W
ALLIGATOR FARMS, INC. ET AL

VERSUS

DAVID GRONER, ET AL

IN RE: Alligator Farms Inc.; Plaintiff(s); Applying for Reconsideration of this Court's action dated October 27, 1995; Parish of Iberia, 16th Judicial District Court, Div. "A" Number 0781443; to the Court of Appeal, Third Circuit, Number CA94-1611, CA94-1612

November 27, 1995

Reconsideration denied. Judgment is res judicata.

CDK
PFC
WFM
JCW
HTL
BJJ
JPV

Appendix A

Supreme Court of Louisiana
November 27, 1995

s/ illegible
Clerk of Court
For the Court

APPENDIX B — DENIAL OF WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT DATED OCTOBER 27, 1995

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 95-C-1670

RAYMOND JOHN O'BRIEN, III

VERSUS

DAVID W. GRONER

C/W
ALLIGATOR FARMS, INC. ET AL

VS.

DAVID GRONER, ET AL

IN RE: Alligator Farms Inc.; Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Iberia 16th Judicial District Court Div. "A" Number 078081, 078143; to the Court of Appeal, Third Circuit, Number CA94-1611, CA94-1612

October 27, 1995

Denied.

BJJ
PFC
WFM
JCW

LEMMON, J. would grant the writ.
KIMBALL, J. would grant the writ.
VICTORY, J. would grant the writ.

Appendix B

Supreme Court of Louisiana
October 27, 1995

s/ illegible
Clerk of Court
For the Court

APPENDIX C — DECISION OF THE LOUISIANA THIRD CIRCUIT COURT OF APPEAL DATED MAY 31, 1995

NOT FOR PUBLICATION

NUMBER 94-1611

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

RAYMOND JOHN O'BRIEN, III

Plaintiff-Appellant

VERSUS

DAVID W. GRONER

Defendant-Appellee

CONSOLIDATED WITH NUMBER 94-1612

ALLIGATOR FARMS, INC., ET AL

Plaintiffs-Appellants

VERSUS

DAVID GRONER, ET AL

Defendants-Appellees

On Appeal from the Sixteenth Judicial District for the Parish of Iberia, State of Louisiana; Honorable C. Thomas Bienvenu, Jr., Judge, Presiding.

Appendix C

BEFORE: LABORDE, WOODARD and AMY, Judges.

LABORDE, Judge.

Plaintiffs filed suit against defendant for legal malpractice. Defendant then filed an exception of prescription, which the trial court granted, dismissing plaintiffs' action. Plaintiffs appeal. We affirm, finding no error in the trial court's judgment.

FACTS

Plaintiff, Raymond John O'Brien, was the owner of Alligator Farms, Inc., a corporation he formed in 1989. Defendant, David Groner, an attorney was hired by the corporation to assist in preparing a financial package and business proposal for potential investors and lending institutions. Groner agreed to accept a percentage of the company's profits instead of monetary payment for his services. In the agreement in which Groner became a shareholder, dated November 11, 1990, the parties listed Groner's responsibilities as follows:

> Responsibility for obtaining all capital necessary to finance the operations of Alligator Farms, Inc., including meeting all operating expenses, and financing for capital improvements necessary to fully develop the operations of Alligator Farms, Inc. which are outlined in Exhibit "1", however reasonable time is allowed for the finances to be obtained.

Groner was then named as an officer and shareholder of the corporation, and he continued to represent the corporation for the purpose of obtaining financing. Groner approached First Production Credit Corporation for financing $1.5 million to Alligator Farms. However, during negotiations with First Production, Groner contacted Hibernia Bank in Lafayette to see if he could get more favorable loan terms for the company. Hibernia apparently agreed to loan Alligator Farms the same amount, with more favorable terms than First Production, and informed Alligator Farms that it could make the funds available immediately. After Alligator Farms began negotiations with Hibernia, it informed First Production that it was no longer interested in obtaining a loan.

Hibernia began evaluating plaintiffs loan application, with O'Brien's assets as collateral. Hibernia advanced $100,000 to Alligator Farms while it was still investigating Alligator Farms' collateral. O'Brien then signed a collateral mortgage on his personal property to Hibernia for $1.5 million, to secure the financing from Hibernia. Hibernia subsequently advanced another $250,000, even though it had not completed a title opinion to O'Brien's oil and gas properties. Soon afterwards, Hibernia informed Alligator Farms that funding would be suspended until the bank could obtain an independent evaluation of the properties.

O'Brien then asked one of his oil and gas attorneys, John Madison, to write a letter to Hibernia in support of his loan. On July 5, 1991, Madison wrote a letter to Hibernia outlining O'Brien's understanding of the status of the loan. By letter dated July 11, 1991 , Harold Turner of Hibernia responded that Hibernia had not made a verbal or written commitment to O'Brien or Alligator Farms for any amount. He further stated

that Hibernia had advanced funds to the company based only on O'Brien's personal income and would not be advancing additional funds until completion of the evaluation of his oil and gas properties. A copy of this letter was also sent to O'Brien. However, after this letter was sent, Hibernia did advance Alligator Farms another $50,000, for a total of $400,000.

The appraisal concluded that O'Brien's properties were insufficient to support the loan. Hibernia subsequently refused to advance Alligator Farms any more funds. Because of this failure of Hibernia to loan the money Alligator Farms believed was promised, Alligator Farms was unable to meet its other commitments. Both O'Brien and Alligator Farms were forced to file for bankruptcy protection.

In August 1991, during bankruptcy proceedings, plaintiffs discovered that there was no written commitment from Hibernia to make a loan for $1.5 million. Yet Groner had represented to plaintiffs that a written loan commitment did exist, obligating Hibernia to loan the entire $1.5 million. In November of 1992, the bankruptcy judge concluded that plaintiffs had no cause of action against Hibernia because they had no written loan commitment. Plaintiffs claim they did not know there was no legal basis for a cause of action against Hibernia until the bankruptcy judge dismissed their claim.

Suit was filed by Raymond John O'Brien against David Groner on July 21, 1993. Another suit was filed against Groner on August 3, 1993, by the trustee in bankruptcy for Alligator Farms. Defendant subsequently filed a peremptory exception of prescription on December 8, 1993. Hearing on the exception was held on June 3, 1994. At that time, the trial

judge granted defendant's motion to consolidate the two cases. The trial court granted defendant's exception of prescription, dismissing plaintiffs claims against Groner. Plaintiff O'Brien appeals, alleging three assignments of error:

> 1. The trial judge erred in finding that Raymond John O'Brien, III had notice which caused prescription to run against his cause of action more than one year before filing his Petition for Damages.
>
> 2. The trial judge erred in finding that Raymond John O'Brien, III has sustained damages more than one year before filing his Petition for Damages.
>
> 3. The trial judge erred in dismissing the petition of Raymond John O'Brien, III in its entirety, as Raymond John O'Brien III alleged several causes of action, i.e., failure of Groner to obtain a written commitment from the lender, failure to obtain an independent evaluation of O'Brien's oil and gas properties, and representing both the corporation and O'Brien individually, to the detriment of O'Brien.

Alligator Farms also appeals, alleging two assignments of error:

> 1. The trial judge erred in finding that Alligator Farms, Inc. had notice which caused prescription to run against its cause

of action more than one year before filing its Petition for Damages.

2. The trial judge erred in finding that Alligator Farms, Inc. had sustained damages more than one year before filing its Petition for Damages.

Prescription

The trial court found that plaintiffs action had prescribed. In his reasons for judgment, the trial court stated as follows:

> The statute that is controlling for purposes of these exceptions is Section 5605 of Title 9 of the Revised Statutes. And for our purposes here, we are talking about a cause of action for legal malpractice and an exception of prescription to that cause of action based on the one-year prescriptive period provided by Paragraph "A" of the section that I just mentioned. And regardless of the doctrine of contra non valentem, the statute is clear that there is a one-year prescriptive period, either requiring that the suit be brought within one year from the date of the alleged act or within one year from the date that the alleged act is discovered or should have been discóvered by the plaintiffs.
>
> The alleged act, as I — as I understand, regardless of whether — of when the

damages may have been actually sustained, was the act of Mr. Groner in not obtaining a written commitment for a $1.2 million loan that he had secured; in other words, that he had received a commitment for that amount but had not taken the appropriate legal step to get it in writing, which he should have prudently done as an attorney. That's the cause of action, I understand, against him. That's the — the act complained of. And the question is: when should that act or omission have been discovered by the plaintiffs?

Well, it seems to me that, regardless of what may have happened before, the Hibernia National Bank, in response — by letter of July 5th, 1991, in response to Mr. Madison's letter to them of July — I'm sorry — their letter of July 11th, 1991, which is Defendant's Exhibit Number 4, in response to Mr. Madison's letter to the bank of July 5th, 1991, Defendant's Exhibit Number 3, makes it clear that it's the bank's position that they did not at that time and up to that time make either a verbal or written commitment to the plaintiffs for any amount. Now, Defendant's Exhibit Number 4 was copied to Mr. O'Brien, and there seems to be no question but that the plaintiffs were aware of this letter.

I don't see any evidence of anything

happening after that that should have caused the plaintiffs to reasonably believe that the bank had made a commitment to them, a firm commitment to them for — for any amount, except what they later loaned, $50,000.00, and certainly not in the amount of $1.2 million. If the bank made no commitment, either verbally or in writing, it should not have come as a surprise in August of '92 to find that out upon examination of the bank's documents; and it should not have been a surprise in November of 1992 when the bankruptcy judge announced that he could not give any more credence to the plaintiff's claim against Hibernia because there was not in existence a written letter of commitment. I don't see what could have happened between July 5th, 1991 — July 11th, 1991 and November of 1992 to make the plaintiffs reasonably believe that the desired commitment was there, either verbally or in writing. I don't doubt that Mr. O'Brien believed it, but it becomes a question under the statute of reasonableness. Should he have believed it? I think then that sufficient time elapsed for the filing of the action, which is one year from the date of the act or when the plaintiffs should have discovered the act. It would seem to me that the exceptions of prescription should be sustained.

Appendix C

We agree with the trial court's conclusions. Under La. R.S. 9:5605, prescription runs from the time of the act or omission, not from the time of the injury. Succession of Hellmers, 93-2386, 93-2387, 93-1883, 93-2073 (La.App. 4 Cir. 5/26/94); 637 So.2d 1302. Thus, the trial court properly sustained the defendant's exception of prescription.

DECREE

The judgment of the trial court is affirmed. Costs assessed to plaintiffs-appellants, Raymond John O'Brien and Alligator Farms, Inc.

AFFIRMED.

APPENDIX D — JUDGMENT AND WRITTEN REASONS FOR JUDGMENT FROM THE SIXTEENTH JUDICIAL DISTRICT COURT, STATE OF LOUISIANA

16th JUDICIAL DISTRICT COURT

DOCKET NUMBER: 78081-A

IBERIA PARISH, LOUISIANA

RAYMOND JOHN O'BRIEN

VERSUS

DAVID W. GRONER

CONSOLIDATED WITH

16TH JUDICIAL DISTRICT COURT

DOCKET NUMBER: 78143-A

IBERIA PARISH, LOUISIANA

ALLIGATOR FARMS, INC. and RAYMOND JOHN O'BRIEN, III

VERSUS

DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C.

Appendix D

JUDGMENT

This matter came for hearing before this Honorable Court on June 3, 1994 on an Exception of Prescription filed by defendants, DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C.;

Present at the hearing were:

1) Leon J. Minvielle, III, counsel for RAYMOND JOHN O'BRIEN;

2) Milo A. Nickel, Jr., counsel for ALLIGATOR FARMS, INC. and RAYMOND JOHN O'BRIEN, III; and

3) William M. Bass, counsel for DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C.

After considering the law, evidence, memorandum and arguments of counsel, together with the pleadings, testimony, and depositions, it is the Court's Judgment that:

The Exception of Prescription filed on behalf of DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C. is hereby sustained with Judgment rendered in favor of DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C. and against plaintiffs, RAYMOND JOHN O'BRIEN, III and ALLIGATOR FARMS, INC., with the costs of this matter to be shared by plaintiffs, RAYMOND JOHN O'BRIEN, III and ALLIGATOR FARMS, INC.

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of DAVID GRONER and

Appendix D

DAVID GRONER & ASSOCIATES, A P.L.C., and against RAYMOND JOHN O'BRIEN, III and ALLIGATOR FARMS, INC., dismissing plaintiffs' demands against DAVID GRONER and DAVID GRONER & ASSOCIATES, A P.L.C., with prejudice at plaintiffs' costs.

JUDGMENT RENDERED, READ AND SIGNED on this 25th day of August, 1994 at New Iberia, Louisiana.

s/ C. Thomas Bienvienu, Jr.
HONORABLE C. THOMAS BIENVIENU, JR.
16th Judicial District Judge

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[73] REASONS FOR RULING

BY THE COURT:

Okay. The statute that is controlling for purposes of these exceptions is Section 5605 of Title 9 of the Revised Statutes. And for our purposes here, we are talking about a cause of action for legal malpractice and an exception of prescription to that cause of action based on the one-year prescriptive period provided by Paragraph "A" of the section that I just mentioned. And regardless of the doctrine of contra non valentem, the statute is clear that there is a one-year prescriptive period, either requiring that the suit be brought within one year from the date of the alleged act or within one year from the date that the alleged act is discovered or should have been discovered by the plaintiffs.

The alleged act, as I — as I understand, regardless of whether — of when the damages may have been actually sustained, was the act of Mr. Groner in not obtaining a written commitment for a $1.2 million loan that he had secured; in other words, that he had received a commitment for that amount but had not taken the appropriate legal step to get it in writing, which he should have prudently done as an attorney. That's the cause of action, I understand, against him. That's the — the act complained of. And the question is: when should that act or omission have been discovered by the plaintiffs?

[74] Well, it seems to me that, regardless of what may have happened before, the Hibernia National Bank, in response — by letter of July 5th, 1991, in response to Mr. Madison's letter to them of July — I'm sorry — their letter of July 11th, 1991, which is Defendant's Exhibit Number 4, in

response to Mr. Madison's letter to the bank of July 5th, 1991, Defendant's Exhibit Number 3, makes it clear that it's the bank's position that they did not at that time and up to that time make either a verbal or written commitment to the plaintiffs for any amount. Now, Defendant's Exhibit Number 4 was copied to Mr. O'Brien, and there seems to be no question but that the plaintiffs were aware of this letter.

I don't see any evidence of anything happening after that that should have caused the plaintiffs to reasonably believe that the bank had made a commitment to them, a firm commitment to them for — for any amount, except what they later loaned, $50,000.00, and certainly not in the amount of $1.2 million. If the bank made no commitment, either verbally or in writing, it should not have come as a surprise in August of '92 to find that out upon examination of the bank's documents; and it should not have been a surprise in November of 1992 when the bankruptcy judge announced that he could not give any more credence to the plaintiff's claim against Hibernia because there was not in existence a written letter of commitment. I don't see what could have happened between July 5th, 1991 — July 11th, 1991 [75] and November of 1992 to make the plaintiffs reasonably believe that the desired commitment was there, either verbally or in writing. I don't doubt that Mr. O'Brien believed it, but it becomes a question under the statute of reasonableness. Should he have believed it? I think then that sufficient time elapsed for the filing of the action, which is one year from the date of the act or when the plaintiffs should have discovered the act. It would seem to me that the exceptions of prescription should be sustained.

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BY MR. NICKEL:

May I add one point for the record, your Honor?

BY THE COURT:

Yes, sir.

BY MR. NICKEL:

For the record, the cases that are cited by both Mr. Minvielle and myself in the briefs state that a plaintiff cannot maintain a cause of action and in fact a cause of action is premature until an ascertainable damage has been suffered with certainty.

Now, our position in this case is that Mr. O'Brien's damage was the loss of his cause of action against Hibernia, which occurred in November when the court did rule.

We — there's no dispute that Hibernia wrote a letter that said, "It's our position there's no commitment." There's also no dispute as between the parties that both sides believed that prior to that letter they had a written commitment. And [76] had they had one, they would have had a valid cause of action against Mr. O'Brien.

Mr. O'Brien could not have sued — had no reason — neither party had a reason to sue Hibernia after those letters were written, because, as Mr. O'Brien has testified, they did fund additional money after those letters; there was no damage.

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The issue becomes: when can he file suit? Even with discovery, even with the act, a cause of action does not exist without damages. The position of all parties in this case — of both plaintiffs is: there was no damage until Mr. O'Brien lost his cause of action against Hibernia Bank. And that occurred in November of 1992.

BY THE COURT:

Well, I don't know. I can let Mr. Bass respond if he wants. You want?

BY MR. BASS:

Your Honor, those comments by counsel were not appropriate. I think the Act is very clear with respect to what the prescriptive period is. And I think it's sufficient, and I think we've met that — met those requirements.

BY MR. NICKEL:

I'm not trying to mislead the Court or counsel about what the Act states, Your Honor. We cited cases that said that a cause of action does not accrue until there is an ascertainable damage that has been caused with sufficient certainty by a given source. And our position is that, before the parties could sue Mr. Groner or before the [77] cause of action even came into existence, there had to be damages which were suffered with certainty as a result of Mr. Groner's conduct. And that's — we believe the evidence here indicates that that damage occurred when there was an adverse ruling within the bankruptcy proceedings.

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BY THE COURT:

Well, I don't think that's so. That's — that's simply when the bankruptcy judge made his ruling. But, to me, it should have been obvious beforehand that the basis for the ruling was there. And I don't think that's when the damages were sustained. That may have been when they became formalized or it became crystal clear or — or it was the date apparently of the dismissal of the action that the plaintiffs had against Hibernia. But I don't — I don't arrive at that same conclusion. But, to the extent that — that you need to protect the record, it's on the record.

Now, you know, appellate courts are very liberal on the question. So it may be y'all may succeed in taking it up. And certainly don't have any hesitation to, if you want to. You're not going to make me feel bad. If they feel differently, that's fine. The claim's not against me.

At any rate, if there's — one of y'all prepare a judgment. I guess — you've got two lawsuits here. Well, they're consolidated.

[78] BY MR. MINVIELLE:

They're consolidated now.

BY THE COURT:

So I guess you'll want to prepare it.

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BY MR. BASS:

Yes, sir.

BY THE COURT:

Send it to counsel for approval as to form, or at least give them an opportunity to object to the form.

BY MR. BASS:

Thank you, Your Honor.

APPENDIX E — EXCERPTS OF BRIEF TO THE SUPREME COURT OF LOUISIANA

IN THE

SUPREME COURT

STATE OF LOUISIANA

DOCKET NO. 95 C 160

RAYMOND JOHN O'BRIEN, III, Appellant

Versus

DAVID W. GRONER, Appellee

-CONSOLIDATED WITH-

ALLIGATOR FARMS, INC., Appellant

Versus

DAVID GRONER AND DAVID GRONER & ASSOCIATES, A P.L.C., Appellee

APPLICATION FOR WRIT OF CERTIORARI FILED ON BEHALF OF ALLIGATOR FARMS, INC. TO REVIEW THE RULING OF THE COURT OF APPEAL, THIRD CIRCUIT

CIVIL CASE

Respectfully Submitted,

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Appendix E

* * *

2. ***The Third Circuit's ruling is unconstitutional as applied because it discriminates against victims of legal malpractice and because it divests the plaintiffs of vested rights.***

In its decision, the Third Circuit stated that under La. R.S. 9:5605, prescription runs from the date of the act or omission, not from the time of the injury, and cited *Succession of Hellmers*, 637 So.2d 1302 (La. App. 4 Cir. 1994). In *Hellmers*, the court stated that Section 5605 was amended to make clear that prescription runs from the *act or omission*, not from the injuries'." 637 So.2d at 1306 (emphasis in original).

It makes little sense that prescription on a cause of action can begin to run before the potential plaintiff has even sustained any damages. However, assuming the Third and Fourth Circuits' interpretation of the 1992 amendments is correct, and the addition of paragraph (b) to Section 5605 eliminated the requirement that the legal malpractice plaintiff have sustained damages before a cause of action accrues, that interpretation is unconstitutional and unduly harsh as it applies to Alligator Farms. The result of this interpretation and application of Section 5605 is that the 1992 amendments eliminated Alligator Farms cause of action against Groner before that cause of action accrued.

The Third Circuit, in this case, the First Circuit in *Vaughn v. Slaughter*, 553 So.2d 36 (La. App. 1 Cir. 1995), and the Fourth Circuit in *Succession of Hellmers*, 637 So.2d 1302 (La. App. 4 Cir. 1994), have all held that the purpose of the 1992

amendments to Section 5605 was to eliminate the requirement that a malpractice plaintiff sustain damage before a cause of action accrues for legal malpractice. If this interpretation is correct, the 1992 amendments simultaneously vested right in Alligator Farms and eliminated that right through the operation of the one-year prescriptive period. However, as interpreted and applied herein, the 1992 amendments to La. R.S. 9:5605 is unconstitutional.

The Louisiana Supreme Court has on numerous occasions observed that the principal contained in Civil Code art. 6 regarding interpretation of the retroactivity of legislative enactments, has constitutional implications under the due process and contract clauses of both the United States and Louisiana Constitutions. *Segura v. Frank*, 630 So.2d 714, 721 (La. 1994); *Cole v. Celotex Corp.*, 599 So.2d 1058, 1063 (La. 1992); *St. Paul Fire and Marine Ins. Co. v. Smith*, 609 So.2d 809, 816 n.11 (La. 1992); *Board of Commissioners v. Department of Natural Resources*, 496 So.2d 281, 291 (La. 1986); *Conn v. Conn*, 468 So.2d 1176, 1181 (La. 1985); *See also*, citations in *Segura*, 630 So.2d at 721. Thus, even where the Legislature has expressed its intent to give a substantive law retroactive effect, the law may not be applied retroactively if it would impair a contractual obligation or disturb vested rights. *Id.*

As This Court stated in *Cole*, 599 So.2d at 1064-64:

> "[S]tatutes enacted after the acquisition of such a vested property right' cannot be retroactively applied so as to divest a plaintiff of his vested right in his cause of action because such a retroactive

> application would contravene the due process guarantees." 599 So.2d at 1063-64, citing *Faucheux v. Alton Oschner Medical Foundation Hospital and Clinic*, 470 So.2d 878, 879 (La. 1985).

Accepting the Third Circuit's interpretation of the relevant statute as correct, then the effect of the amendment would have been to create a new right in Alligator Farms, that being the right to sue prior to sustaining any injuries. Simultaneously, this statute would have deprived Alligator Farms of that very right by virtue of the application of the prescriptive statute.

This Court reviewed an analogous situation in *Taylor v. Giddens*, 618 So.2d 834 (La. 1993). In *Taylor*, the argument advanced by the defense would have resulted in wrongful death claimants losing their cause of action before it accrued. In responding to that argument, This Court stated that:

> "Their remedy to address their civil wrong would have been eliminated prior to the accrual of their cause of action. Such a result is intolerable as it discriminates among wrongful death tort claimants."

CONCLUSION

The trial court and Court of Appeal wrongly decided that prescription began to run in this case when the clients received a letter which was later contradicted by their counsel and by the actions of the letter's author. Under any interpretation of the discovery rule, prescription did not begin to run until the

plaintiffs possessed sufficient facts to put them on notice that they may have a cause of action. Those facts were adduced by the plaintiffs within a year of the commencement of the instant action.

To the extent that the courts below retroactively applied their interpretation of the statute to divest the plaintiffs of a vested right or to treat them differently from victims of other tort feasors, their decision violates state and federal Constitutions.

If the statute was interpreted correctly by the courts below and the effect of the statute is to deprive a victim of recovery for a wrong committed upon them by another, the statute violates state and federal Constitutions as well.

Respectfully Submitted:

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